Supreme Court, U.S.
FILED

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No. ___

# IN THE
# Supreme Court of the United States

OCTOBER TERM, 1995

Anthony Cortez Jackson, Petitioner

v.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner denied equal protection of the law when the U.S. Court of Appeals for the Ninth Circuit upheld the sentence in this case?

2. Was the petitioner denied due process of law when the U.S.Court of Appeals for the Ninth Circuit upheld the sentence in this case?

3. Was the petitioner denied protection from the Eighth Amendment to the U.S. Constitution when the U.S. Court of Appeals for the Ninth Circuit upheld the sentence in this case?

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## I. REFERENCE TO PREVIOUS OPINIONS

The Order Affirming Mr. Jackson's conviction and sentence is noted at ____ F.3d (9th Cir. 1994). The unpublished opinion dated December 14, 1994 is contained in the Appendix, pp. A-1 through A-7.

## II. STATEMENT OF JURISDICTION

A. Anthony C. Jackson seeks review of the United States Court of Appeals for the Ninth Circuit Order Affirming his conviction and sentence dated December 14, 1994 (See Appendix, pp. A-1 through A-7).

This Court has jurisdiction to review the United States Court of Appeals for the Ninth Circuit Orders affirming the conviction and sentence pursuant to 28 U.S.C. § 1254.

B. This Petition for Writ of Certiorari is based on the following Constitutional Provisions:

1) The Fifth Amendment to the United States Constitution;

2) The Eighth Amendment to the United States Constitution; and

3) The Fourteenth Amendment to the United States Constitution;

See Appendix, pp. A-8 through A-10.

III. STATEMENT OF THE CASE

Petitioner, Anthony C. Jackson was charged by indictment in the United States District Court for the Western District of Washington on August 5, 1993 in a six-count indictment with Possession of Cocaine with Intent to Distribute, carrying a Firearm in Relation Thereto, and Possession of Cocaine Base. On September 29, 1993 a nine count

superseding indictment was returned by the grand jury charging Mr. Jackson with Possession of Cocaine Base with Intent to Distribute, Carrying a Firearm, Felon in Possession of a Firearm, and Possession of Cocaine Base. On October 6, 1993, an enhanced penalty information was filed by the United States Attorney pursuant to 21 U.S.C. § 851.

On December 15, 1993, Mr. Jackson entered a plea of guilty to Possession with Intent to Distribute Cocaine Base, as described in Count IV of the superseding indictment in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A). As part of the plea agreement, the government moved to dismiss the other 8 counts at the time of sentencing.

On February 25, 1994, District Court Judge John C. Coughenour imposed a

sentence of 10 years supervised release, a $50 special assessment and a prison term of 240 months (20 years). At the time of sentencing, the court asked the Assistant United States Attorney what his sentence recommendation would be if the Court were to set aside the guidelines and the mandatory minimums. In response, the AUSA stated:

> Your Honor, in light of what his past record has been, I'd say the sentence should be somewhere in the neighborhood of between 10-12 years.

In response, the Court agreed as follows:

> Well, that is exactly where I come down . . . I think a 20 year sentence in this case is far beyond, probably double, what an appropriate sentence would be.

Mr. Jackson filed a timely notice of appeal from the sentence in this case. On appeal, he argued that the penalties for the "cocaine base" violate the Equal

Protection Clause of the United States Constitution. Further, Mr. Jackson argued on appeal that the 100 to 1 drug equivalency ratio of 21 U.S.C. § 841 violates the due process clause of the Fifth Amendment to the United States Constitution. Finally, Mr. Jackson argued that the sentence in this case violates the Eighth Amendment to the United States Constitution as cruel and unusual punishment. The United States Court of Appeals for the Ninth Circuit summarily denied Mr. Jackson's appeal stating that each constitutional challenge was foreclosed by previous decisions by the Ninth Circuit: namely, United States v. Harding, 971 F.2d 410 (9th Cir. 1992), cert. denied, 113 S.Ct 1025 (1993); United States v. Malone, 886 F.2d 1162 (9th Cir. 1989); and United

States v. Van Winrow, 951 F.2d 1069 (9th Cir. 1991).

IV. ARGUMENT

A. Review should be granted because recent decisions of United States District Courts have struck down the mandatory minimum sentences and statutory sentencing guidelines pertaining to cocaine base.

The recent cases of United States v. Clary, 846 F.Supp. 768 (E.D. Miss. 1994) and United States v. Davis, 864 F.Supp. 1303 (N.D. Georgia 1994) found that the mandatory minimum sentencing requirements for "cocaine base" violated the Equal Protection Clause of the United States Constitution. In United States v. Clary, the District Court analyzed the gross disparity in the penalties for alternate forms of cocaine and concluded that the sentencing distinction merited strict scrutiny, or at a minimum, intermediate scrutiny. The exhaustive analysis of the

legislative history in Clary established a discriminatory purpose in the 100 to 1 ration between crack and powder cocaine.

In United States v. Davis, the court held that the Equal Protection Clause was violated because "cocaine base is synonymous with cocaine." Both forms of cocaine are smokeable so there is no rational basis for punishing one form of smokeable cocaine more severely than other forms. Thus, 21 U.S.C. § 841 violates the Equal Protection Clause. United States v. Davis, 846 F.Supp. 1303, 1309 n.25 (N.D. Georgia 1994).

B. The 100 to 1 drug equivalency ratio of 21 U.S.C. § 841 and Sentencing Guideline 2D1.1(c) for cocaine base offenses violates the due process clause of the Fifth Amendment to the United States Constitution because it is not based on a rational distinction between the two forms of cocaine.

In United States v. Davis, supra, Judge Forrester heard the testimony of

four nationally renown experts on this subject.

> All of the experts testified that in the scientific community, the term 'cocaine base is synonymous with cocaine.'

864 F.Supp. at 1305.

These experts also agreed that the term 'crack' as it relates to cocaine substances does not have a fixed meaning in the scientific community. 864 F.Supp. at 1305.

Pharmacologists also agreed that there was essentially no difference in the sizes of dosage units for cocaine and "cocaine base." They have the same molecular structure, molecular weight and melting point. 864 F.Supp. at 1305.

After review of the legislative history behind 21 U.S.C. § 841, Judge Forrester concluded that the 100 to 1

drug equivalency ration was based upon some Congressional opinion that smoking cocaine has a particularly heightened potential for abuse. However, the court noted that:

> **It is now known that cocaine, irrespective of the means of manufacture, is smokeable.**

864 F.Supp. at 1308.

In sum, the 100 to 1 drug equivalency ration is arbitrary, capricious and scientifically wrong. Despite the fact that there is no rational basis for the 100 to 1 drug equivalency ration, Mr. Jackson was sentenced to a prison term more than double the standard range for the same amount of powder cocaine.*[1] Indeed, the

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[1]*Based upon the same amount of powder cocaine, (457.6 grams) rather than "cocaine base," Mr. Jackson's sentence range would be 92-115 months in prison.

sentencing court personally believed the sentence of Mr. Jackson should have been approximately one-half of the sentence he felt obligated to impose.

C. The arbitrary and capricious enforcement of the cocaine base laws violates the Eighth Amendment to the United States Constitution.

As explained in the United States v. Walls, 841 F.Supp. 24 (D.C. Dist. 1994), the vast disparity of the 100 to 1 punishment ratio for "cocaine base" over powder cocaine raises Eighth Amendment proportionality concerns. The penalty scheme draws an unintentional and arbitrary distinction between two forms of the same drug. Additionally, the starkly disparate racial impact of the 100 to 1 powder to crack ration coupled with the substantial evidence that the crack penalties are being enforced in a discriminatory manner, demonstrate

purposeful discrimination - which, by definition, is arbitrary and capricious. See, Gregg v. Georgia, 428 U.S. 153, 200 (1976).

V. CONCLUSION

This Court should grant review because the petitioner was denied equal protection of the law and due process of law when the United States Court of Appeals for the Ninth Circuit upheld the sentence in this case. Additionally, the sentence in this case violates the Eighth Amendment to the United States Constitution.

Respectfully submitted this 8th day of March, 1995.

FINEGOLD, ZULAUF & ENGELHARD

By _____

Scott J. Engelhard
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Anthony Cortez Jackson

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1995

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Anthony Cortez Jackson, Petitioner

v.

United States of America, Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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APPENDIX FOR PUBLICATION

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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | NO. 94-30090 |
| Plaintiff-Appellee, | ) | D.C. NO. CR-93-00379 JCC |
| v. | ) | **MEMORANDUM***[1] |
| ANTHONY CORTEZ-JACKSON, | ) | |
| Defendant-Appellant. | ) | |

Appeal from the United States District for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted December 8, 1994**[2]

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App. p. 34(a), Ninth Circuit R. 34-4.

Before: **NOONAN, O'SCANNLAIN,** and **LEAVY,** Circuit Judges.

Anthony Jackson appeals a sentence of 240 months in prison following his guilty plea to one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. We affirm.

I

Between October 7, 1992 and August 9, 1993, Jackson was arrested and searched several times for various offenses. By the time an indictment was returned and an arrest warrant issued, a total of 457.6 grams of cocaine base, 41.9 grams of marijuana, 2 handguns, and $151,340 in cash had been seized from Jackson.

Jackson pled guilty to one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841. Under 21 U.S.C. § 841(b) and § 2D1.1(c) of the Sentencing Guidelines, if the offender has a prior felony drug conviction, twenty years in prison is the mandatory minimum penalty for an offense involving either five kilograms of powder cocaine of fifty grams of cocaine base ("crack"). Jackson has three prior convictions for possession of cocaine and one for delivery of cocaine. On February 25, 1994, Jackson was sentenced to twenty years i prison.

II

Jackson claims the distinction between cocaine and crack in 21 U.S.C. § 841(b) and Sentencing Guideline §

2D1.1(c) violates the Equal Protection Clause.

Jackson's equal protection claim is foreclosed by United States v. Harding, 971 F.2d 410 (9th Cir. 1992), cert. denied, 113 S.Ct. 1025 ((1993), in which this court rejected an identical challenge to 21 U.S.C. § 841(b). See id. at 412-13.

III

Jackson claims the 100 to 1 drug equivalency ration between cocaine and crack in 21 U.S.C. § 841(b) and Sentencing Guideline § 2D1.1(c) is irrational and violates the Due Process Clause.

Jackson's due process claim is foreclosed by United States v. Malone, 886 F.2d 1162 (9th Cir. 1989), in which this court rejected an identical

challenge to 21 U.S.C. § 841(b). In Malone, this court upheld Congress' "market-oriented approach" as a rational basis for treating cocaine and crack differently. See id. at 1166. See also Harding, 971 F.2d at 414; United States v. Hoyt, 879 F.2d 505, 512 (9th Cir.), modified, 888 F.2d 1257 (1989); United States v. Savinovich, 845 F.2d 834, 838-39 (9th Cir.), cert. denied, 488 U.S. 943 (1988).

**IV**

Jackson claims the mandatory minimum sentence under 21 U.S.C. § 841(b) violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Jackson had three prior convictions for possession of cocaine and one for delivery of cocaine. As a result, he was

eligible for a life sentence without parole under 21 U.S.C. § 841(b)(1)(A). In United States v. Van Winrow, 951 F.2d 1069 (9th Cir. 1991), this court upheld a sentence of life in prison without parole under section 841(b)(1)(A) against an Eighth Amendment challenge. See id. at 1071 (citing Harmelin v. Michigan, 501 U.S. 957 (1991). See also Hoyt, 879 F.2d at 512-14 (upholding mandatory minimum sentence of 10 years for a first time sentence under 21 U.S.C. § 841(b)(1)(A)). The defendant in Van Winrow possessed 151.9 grams of crack cocaine and had three prior felony convictions. Jackson possessed more than double that amount of crack cocaine. In light of Van Winrow, Jackson's sentence cannot be considered a violation of the Eight Amendment.

Jackson's other due process claims and Eighth Amendment claims are restatements of the above claims and are similarly foreclosed by the settled law of this circuit.

**AFFIRMED.**

## AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein the reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.